

U.S. DEPARTMENT OF LABOR

SECRETARY **OF** LABOR
WASHINGTON, D.C.

DATE: June 16, 1988
CASE NO. **82-CTA-267**

ALAMEDA COUNTY TRAINING
AND EMPLOYMENT BOARD/ASSOCIATED
COMMUNITY ACTION PROGRAM

v.

UNITED STATES DEPARTMENT OF LABOR

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER OF REMAND

BACKGROUND

This case arises under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§ 801-999 (Supp. V 1981), ^{1/} and involves an audit questioning grant expenditures by the Alameda County Training and Employment Board/Associated Community Action Program (ACTEB), a grantee under CETA. An initial audit report was submitted to the Department of Labor's Office of the Inspector General (OIG) on September 16, 1981. On January 12, 1982, the OIG sent a final draft of the audit report to the Grant Officer and to ACTEB. The Grant Officer issued his final determination on May 17, 1982, ^{2/} which was more than 120 days after his receipt of the initial audit report. Section 106(b) of CETA provides that the Secretary issue a final determination after an audit within 120 days after the Secretary had

^{1/} CETA was repealed effective October 13, 1982, and replaced by the Job Training Partnership Act, 29 U.S.C. §§ 1501-1781 (1982). However, CETA continues to govern administrative or judicial proceedings pending on October 13, 1982, or begun between October 13, 1982, and September 30, 1984. 29 U.S.C. § 1591(e).

^{2/} Administrative File (AF) at Tab L.

reason to believe that a grantee was failing to comply with the requirements of the Act. **3/**

ACTEB timely requested a hearing before that Office of Administrative Law Judges (**OALJ**), contending that the delay in the issuance of the final determination violated the statutory requirements and posed a jurisdictional bar to the Secretary's proceeding to recoup allegedly misspent CETA grant funds. The Grant Officer contended that the statutory language was directional and that noncompliance with the time limitations did not cause the Secretary to lose jurisdiction over the case. Administrative delays prevented a hearing until 1984. By that time, the United States Court of Appeals for Ninth Circuit had decided City of Edmonds v. Department of Labor, 749 **F.2d** 1419 (1984), which held that the failure to issue a final determination within 120 days of receipt of an audit report was a jurisdictional bar preventing the Secretary from pursuing the recoupment of misexpended CETA funds. On February 8, 1985, the Department requested that the court reconsider its decision en banc. On March 25, 1985, ACTEB and the Department entered into the following stipulation:

IT IS HEREBY STIPULATED by and between counsel for the parties hereto as follows:

3/ **[W]henever** the Secretary has reason to believe (because of an audit, ...) that a recipient of financial assistance under this Act is failing to comply with the requirements of this Act ... the Secretary shall investigate the matter. The Secretary shall ... make the final determination required ... not later than 120 days after receiving the complainant.

29 U.S.C. § 816(b).

STIPULATED FACTS

1. The draft of the audit was received by the Office of the Inspector General, United States Department of Labor [hereinafter OIG] from the auditors, **CATTEN YU & CO.** on or about May 7, 1981. Said draft audit was rejected by OIG, and returned to **CATTEN YU & CO.** on or about July 9, 1981;
2. The draft of the audit was resubmitted to OIG by **CATTEN YU & CO.** at some time prior to September 15, 1981, the exact date being unknown to either party;
3. The draft of the audit was transmitted by OIG to both the Grant Officer and ACTEB on or about September 16, 1981;
4. ACTEB submitted its comments regarding the audit on or about October 26, 1981, received by DOL on October 28, 1981 [AF, TAB Q];
5. On January 12, 1982, the audit was mailed by OIG to the Grant Officer, who received the same on or about January 19, 1982;
6. The Grant Officer transmitted the audit to ACTEB on January 20, 1982 [AF, Tab P]; and
7. The Final Determination of the Grant Officer was issued on May 17, 1982 [AF, Tab L].

STIPULATED LEGAL ISSUE

IT IS HEREBY FURTHER STIPULATED that City of Edmonds v. Department of Labor, 749 F2d 1419 (9th Cir. 1984) pet reh pending, held that the 120 day time limit set forth in 29 USC § 819(b) [sic] was jurisdictional. As relevant to this case, 29 USC § 816(b) states:

"(b) Whenever the Secretary receives a complaint from any interested person or organization ... which alleges, or whenever the Secretary has reason to believe (because of an audit, report, **onsite** review, or otherwise) that a recipient of financial assistance under this Act, is failing to comply with the requirements of this Act, the regulations under this Act, or the terms of the comprehensive employment and

training plan, the Secretary shall investigate the matter. The Secretary shall conduct such investigation, and make the final determination required by the following sentence regarding the truth of the **[a]llegation** or belief involved, not later than 120 days after receiving the complaint."

Under the stipulated facts of this case, there is a disputed legal issue regarding the timeliness of the Secretary's Final Determination that could have the effect of being entirely dispositive of this case, in the absence of a reversal or modification of City of Edmonds, suura, to wit:

- a. If the date on which the 120 day period commenced to run was when the draft audit was either submitted (May 7, **1981**), or resubmitted (between May 7, 1981 and September 15, **1981**), or on any other date prior to January 15, 1982, more than 120 days elapsed from the time the Secretary "... had reason to believe ..." to the issuance of the Final Determination (May 17, 1982).
- b. If the date on which the 120 day period commenced to run was the date on which the Grant Officer transmitted the audit to ACTEB (January 20, **1982**), only 116 days elapsed to the issuance of the Final Determination (May 17, 1982).

IT IS HEREBY FURTHER STIPULATED that until such time as the final legal outcome of City of Edmonds v. Department of Labor is determined, it would be a waste of time and public funds to proceed to trial on the merits of this case.

Appellant and Respondent have other matters pending before this tribunal that present similar timeliness issues, and have stipulated to continuing pending trial dates or removing said cases from the trial calendar **pending** the final legal outcome of City of Edmonds v. Department of Labor.

WHEREFORE, Appellant and Respondent jointly move that this case be taken off the trial calendar pending the final legal outcome of City of Edmonds

v. Department of Labor, subject to the right of either party to move to restore the case to the calendar for the limited purpose [sic] of making any appropriate motions for summary adjudication of the issue of the timeliness of the Secretary's Final Determination herein as soon as the final legal outcome of City of Edmonds v. Department of Labor is known.

On April 12, 1985, the U.S. Court of Appeals for the Ninth Circuit denied the Department's request for a rehearing in City of Edmonds.

On November 15, 1985, the presiding Administrative Law Judge (ALJ), set aside the Grant Officer's final determination finding that more than 120-days elapsed before the Grant Officer's final determination, that he was bound by the Ninth Circuit's decision in City of Edmonds, and thus that the Secretary lost jurisdiction to continue these proceedings to recoup the allegedly misspent CETA funds. ^{4/}

On December 3, 1985, the Grant Officer timely requested that the Secretary review this case, and on December 24, 1985, Secretary Brock asserted jurisdiction and stayed the ALJ's decision, pending the final decision of the Supreme Court which then had before it the issue of the jurisdictional effect of noncompliance with the 120-day rule. ^{5/}

On May 19, 1986, the Court issued its decision in Brock v. Pierce County, 476 U.S. 253, holding that the Secretary's failure to comply

^{4/} Decision and Order Setting Aside the Grant Officer's Decision (D. and O.), Alameda County Training and Employment Board/Associated Community Action Program v. United States Department of Labor, Case No. 82-CTA-267, (November 15, 1985).

^{5/} Pierce County v. United States, petition for cert. filed sub nom. Brock v. Pierce County, cert. granted, 474 U.S. 944 (1985).

with the **120-day** rule of section 106(b) did not bar the Secretary from recouping misspent CETA funds. 476 U.S. at 266. In expressly reversing the Ninth Circuit's decision in Pierce County, the Court vitiated the precedential effect of the Ninth Circuit's decision in City of Edmonds.

DISCUSSION

The issue before me is whether, by virtue of the March 25, 1985, stipulation, the Secretary is bound by the holding in the City of Edmonds rather than the Supreme Court's decision in Pierce County. There is an ancillary question which concerns the appropriate start date from which the 120 days is to be counted in this case ^{6/} but given the disposition of the primary issue, this question need not be reached.

The parties were aware that both City of Edmonds and Pierce County were potential vehicles to get the 120-day issue before the Supreme Court. The record (unpaginated) contains a letter to ALJ Heyer (the presiding ALJ), dated July 9, 1985, from ACTEB's counsel requesting additional time in which to respond to an Order to Show Cause stating:

Inasmuch as it is the understanding of Mr. Ingenito, Counsel for the Department of Labor, and myself, that the petition [requesting certiorari to the Supreme Court in City of Edmonds] is in the process of being filed, and further that the Department is considering further proceedings in Pierce County v. United States, etc., **85-D.A.R.** 1636, DOL Nos. **81-CETA-88** and **81-CETA-120**, which may have some application to this case.

^{6/} Stipulation, supra, at 4.

Since the ultimate disposition of either or both of these cases could be dispositive of this action, Mr. Ingenito and I both jointly move that the time to respond to the Order to Show Cause be extended for an additional period of time until it can be determined whether the United States Supreme Court will grant certiorari in either City of Edmonds, or Pierce County, or both. Mr. Ingenito has authorized me to prepare this joint motion.

* * * *

cc. Mr. Ingenito

Therefore, although the March stipulation was framed in terms of the legal outcome of City of Edmonds, the record makes it clear that all parties were aware that Edmonds might not be the case that presented the issue to the Supreme Court. The July 9 letter (joint motion) submitted by **ACTEB's** counsel 1/ demonstrates that the parties believed that further proceedings should be deferred until the question of the Court's granting certiorari was "determined ... in either ... or both" cases.

Thereafter, the time within which to petition for certiorari in City of Edmonds elapsed, but the Court granted certiorari in Pierce County on November 5, 1985. Nonetheless the **ALJ** in response to a motion by ACTEB, dismissed the Grant Officer's final determination. The **ALJ** concluded that he was bound by City of Edmonds, and he expressly declined to "extend the delay" pending the outcome of Pierce County, as the Grant Officer urged. D. and O. at 5-6.

1/ The **ALJ** granted a continuance until November 1, 1985.

Subsequent to the Court's decision in Pierce County, the parties were given the opportunity to brief this case. ^{8/} In its brief, ACTEB urges that the March 1985 stipulation be interpreted to bind the parties by the final outcome of City of Edmonds, rather than by the Supreme Court's disposition of the jurisdictional question of the 120-day requirement of Section 106(b). The precise language of the stipulation does not support that interpretation. Read closely, the stipulation states that the Ninth Circuit's decision in City of Edmonds held that the 120-day time limit in the CETA statute was jurisdictional, and that until there was a final legal outcome in City of Edmonds, this case be removed from the trial calendar. This was done. It was further stipulated that after the final legal outcome of City of Edmonds was known, either party could move to restore the case to the calendar for the purpose of moving for summary adjudication on the issue of the timeliness of the Secretary's final determination. This also was done. Thus, the parties have agreed that these two actions could be taken as a result of the City of Edmonds: first, the removal of this case from the trial calendar pending a final legal outcome in the City of Edmonds; and second, the restoration of this case to the trial calendar after the final legal outcome of the City of Edmonds is known. Nowhere in the stipulation have the parties agreed to be bound by the City of Edmonds rather than the rule enunciated by the Supreme Court in Pierce County. Therefore, this

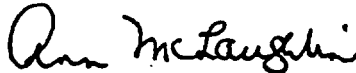
^{8/} Secretary's Order Order Lifting Stay and Establishing Briefing Schedule, dated August 12, 1986, and, Secretary's Order Order Granting Extension of Time in which to File Initial Briefs, dated October 1, 1986.

case is governed by the Supreme Court's ruling in Pierce County, i.e. that the Secretary does not lose the power to recover misspent **CETA funds** if a final determination is not issued within 120 days from the receipt of a final audit report. 476 U.S. at 266.

Therefore this case will be remanded for a hearing before the **ALJ** on the merits of the Grant Officer's disallowance of **ACTEB's** CETA costs, and the parties shall have a full opportunity to present their substantive evidence and arguments on the validity of the Grant Officer's final determination.

Accordingly, the **ALJ's** decision of November 15, 1985, IS VACATED and this case IS REMANDED to the Administrative **Law** Judge for proceedings to determine the extent and validity of the Grant Officer's final determination.

SO ORDERED.



Secretary of **Labor**

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: Alameda County Training and Employment Board/Associated
Community Action Program v. United States Department
of Labor

Case No. : **82-CTA-267**

Document : Secretary's Decision and Order of Remand

A copy of this document was sent to the following parties on

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